UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

CROZER-CHESTER MEDICAL CENTER

Employer

and **Case 04-RC-257107**

CROZER PROFESSIONALS UNION/PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The sole issue in this proceeding is whether, in an acute-care hospital, it is appropriate for a non-incumbent labor organization to represent residual professional and technical units where separate non-conforming professional and technical units are currently represented by other labor organizations. The Petitioner seeks to represent separate units of all currently unrepresented technical and professional employees employed at Crozer-Chester Medical Center ("the Employer" or "CCMC"), and defends the appropriateness of the petitioned-for units under *St. Mary's Duluth Clinic Health System*, 332 NLRB 1419 (2000). The Employer, relying on Board Member Hurtgen's dissent in *St. Mary's*, argues that the petitioned-for units are inappropriate as only the incumbent labor organizations currently representing their respective non-conforming professional and technical units should be permitted to organize and represent the petitioned-for residual units.

A Hearing Officer of the Board heard this case on a fully stipulated record consisting of a Stipulation of Facts and various exhibits. I have considered the Stipulation of Facts, the evidence, and the arguments presented by the parties, as well as applicable legal precedent. The sole issue involved in this case is currently settled by extant law—the majority opinion in *St. Mary's*—and as such, I conclude that the petitioned-for units are appropriate. I am, therefore, directing an election in the units described below.

I. FACTUAL OVERVIEW

1. History of Collective-Bargaining at the Employer's Upland, Pennsylvania facility.

The Employer operates an acute-care hospital in Upland, Pennsylvania, where it employs a number of professional[1] and technical[2] employees. Since April 6, 1972, Laborers' International

[1]/ Unless otherwise noted, all references to "professional" employees throughout this Decision refer to the term "professional" within the meaning of 29 C.F.R. § 103.30(a)(3).
[2]/ Unless otherwise noted, all references to "technical" employees throughout this Decision refer to the term "technical" within the meaning of 29 C.F.R. § 103.30(a)(4).

Union of North America, Local 1301 a/w Laborers' International Union of North America, AFL-CIO ("LIUNA") has represented a unit of approximately 450 employees at CCMC. Approximately 400 of those employees are "nonprofessional" employees within the meaning of 29 C.F.R. § 103.30(a)(8). The remaining approximately 50 employees in the LIUNA unit are technical employees. Additionally, the National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO a/w District 1199C ("District 1199C"), has represented a bargaining unit of approximately 100 technical employees employed at CCMC since about September 16, 1975. District 1199C and LIUNA currently have collective bargaining agreements with the Employer.

Lastly, since approximately 1978, the Society of Pharmacists has represented approximately 15 pharmacists at CCMC. The pharmacists are professional employees. The most recent collective-bargaining agreement between the Society of Pharmacists and the Employer expired in 2017; the parties continue to negotiate for a successor agreement. At no point has the Society of Pharmacists, LIUNA, or District 1199C sought to intervene in this matter. In fact, District 1199C, in writing, informed the regional director that it would not seek to intervene in this proceeding and that it would not attend the hearing.

2. The instant petition.

On February 28, 2020,[3] the Petitioner filed this petition seeking to represent certain of the Employer's professional and technical employees, each in a separate unit. The petition includes as "Unit A" employees in the following classifications: Clinical Nutritionists, Clinical Nutritionist Specialists, Lead Clinical Nutritionists, Occupational Therapists, Physical Therapists, Speech Therapists, Social Workers, Senior Therapists, and Dysphasia Specialists. The Employer and Petitioner stipulated that the employees in Unit A are professional employees. Additionally, the petition includes as "Unit B" employees in the following classifications: Certified Occupational Therapy Assistants, Rehabilitation Aides, Physical Therapy Assistants, Recreational Therapists, and Social Work Techs. With respect to Unit B, the Social Work Tech position was created around August 2017, and the remaining classifications of technical employees in Unit B have been in existence since at least the year 2000. The Employer and Petitioner stipulated that the employees in Unit B are technical employees.

The parties further stipulated that none of the employees in Unit A or Unit B are currently included in any existing bargaining unit. Moreover, the Petitioner and the Employer agree that the Petitioner seeks to represent all currently unrepresented technical employees and all currently unrepresented professional employees at CCMC. Put differently, other than the technical employees and professional employees in the existing units and the petitioned-for units, there are no technical employees or professional employees employed by the Employer. Because they are inclusive of all unrepresented employees in their respective categories, the units sought are what the Board deems "residual units."

[3]/ Herein, all dates occurred in 2020, unless otherwise noted.

II. BOARD LAW

1. The Board's Health Care Rule

In 1989, after engaging in a notice and comment rulemaking process, the Board issued a Health Care Rule which set forth generally appropriate units in acute care hospitals. See generally, 52 Fed. Reg. 25142 et seq., 284 NLRB 1515 et seq. (1987); 53 Fed. Reg. 33900 et seq., 284 NLRB at 1528 (1988); 54 Fed. Reg. 16336 et seq., 284 NLRB at 1580 (1989). In doing so, the Board sought to avoid proliferation of health care bargaining units and to limit the possible units to a reasonable, finite number of groups that each display a community of interest within themselves and a disparity of interests from other groups. See 52 Fed. Reg. 25146, 284 NLRB at 1522; 53 Fed. Reg. 33905, 284 NLRB at 1536. The Health Care Rule provides that, except in "extraordinary circumstances" or where nonconforming units already exist, the only units appropriate in an acute care hospital are the following, and combinations thereof: (1) all registered nurses; (2) all physicians; (3) all professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. *Collective-Bargaining Units in the Health Care Industry; Final Rule*, 54 Fed. Reg. at 16336-48 (1989), 284 NLRB at 1579-97 (1987); see also *American Hospital Association v. NLRB*, 499 U.S. 606 (1991) (upholding the Health Care Rule).

With respect to the situation where nonconforming units already exist, the Health Care Rule provides that additional units will be found appropriate only if they conform "insofar as practicable" to one of the Rule's eight enumerated units. 29 C.F.R. § 103.30(c)

2. Residual Non-Conforming Units Under the Health Care Rule

A gray area of the Health Care Rule was at issue in *St. Mary's Duluth Clinic Health System,* 332 NLRB 1419 (2000), where the Board considered whether a petitioned-for residual non-conforming unit was appropriate under the Health Care Rule. In November 1998, St. Mary's Medical Center, an acute-care hospital in Duluth, Minnesota, employed a unit of 175 LPNs represented by the Minnesota Licensed Practical Nurses Association (MLPNA). Id. at 1419. According to the Board, that unit was a "non-conforming" unit – one that does not conform to one of the specifically enumerated units under the Health Care Rule – because it excluded 230 additional technical employees at the same hospital. Ibid. The United Steelworkers of America filed a petition to represent the residual technical unit, i.e. the 230 unrepresented technical employees. Id. at 1420. St. Mary's Medical Center challenged the appropriateness of the petitioned-for-unit, arguing that "the only appropriate unit would be an all-technical unit that included both the already represented LPNs and remaining technical employees." Ibid. Thus, the issue decided by the Board in *St. Mary's* was as follows:

> whether, in an acute-care hospital where there is a nonconforming bargaining unit consisting of some, but not all, of the employees who would otherwise constitute an appropriate unit under the Board's Health Care Rule, the Board will process a petition

> by a different labor organization for a separate residual unit consisting of the remaining nonrepresented employees.

Id. at 1419.

Rejecting the employer's arguments, the Board found that the petitioned-for unit of all remaining technical employees was an appropriate residual unit. Id. at 1420. It did so for several reasons. First, according to the Board, the Health Care Rule itself provided justification for finding appropriate a petitioned-for residual unit comprised of all unrepresented employees: 29 C.F.R. § 103.30(c) "provides that, where there are existing, nonconforming units, additional units will be found appropriate only if they conform 'insofar as practicable' to one of the enumerated units." Ibid. As the Board reasoned, the phrase "insofar as practicable" permits the finding that a petitioned-for residual unit comprising all unrepresented employees is appropriate; to find otherwise and permit only the units enumerated in the Health Care Rule, such as an all-technical employee unit, "would render the section superfluous." Ibid. Citing to additional authority, the Board stated "that it was not the intent of the [Health Care Rule] to require the abandonment of, and replacement of, existing historical units with units that specifically conform to those set forth in the [Health Care Rule]." Id. at 1421, citing *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), and *Crittenton Hospital*, 328 NLRB 879 (1999).

In support of its reading of the Health Care Rule's phrase "insofar as practicable," the Board was guided by overarching Board principles and policies "that provide context for the proper interpretation of the Rule." *St. Mary's*, supra at 1421. According to the Board, "the phrase 'insofar as practicable' . . . should not be interpreted to preclude a nonincumbent union from representing a separate residual unit of all unrepresented employees residual to those in the existing nonconforming unit." Ibid. Indeed,

> to require an incumbent union with a long, harmonious bargaining relationship to represent a new, additional group of employees—who may outnumber the employees in its existing unit, and who may have competing interests from the employees in the existing unit—or to require a petitioning union to raid the incumbent's existing unit, would be antithetical to these important policies.

Ibid.

While the Board was mindful of congressional concern about undue proliferation of bargaining units in the healthcare industry, it concluded that such concern "must be weighed against the *significant*, long-established policy of according deference to existing collective-bargaining relationships." Ibid. (emphasis added). As the Board noted, the concern for the undue proliferation of bargaining units in the healthcare industry was alleviated to a large degree by the Health Care Rule and subsequent Board precedent, "requiring that any residual unit include *all* unrepresented employees in the particular classification at issue." Ibid. (emphasis in original)

Finally, the Board found support for its decision in the Act "by preserving the Section 7 rights of the unrepresented employees to pursue bargaining representation." Ibid. As the Board noted, were an incumbent union representing a non-conforming unit to choose not to organize the

remaining unrepresented employees residual to that unit, a rule limiting the residual employees to representation only through the incumbent union would foreclose any representational opportunity for them through the duration of the incumbent-employer contract. Ibid. Further safeguarding the Section 7 rights of the petitioned-for employees, the Board in *St. Mary's* allowed the MLPNA—the incumbent union—to be included on the ballot, as it sought to intervene in the matter and expressed an interest in participating in the proceeding. Id. at 1422.

3. Member Hurtgen's Dissent in *St. Mary's*.

Member Hurtgen dissented from the majority opinion in *St. Mary's* because in his opinion, the majority's decision was at odds with the Health Care Rule, Board precedent, and the congressional admonition against undue proliferation of units. Ibid. According to Member Hurtgen, the only appropriate unit was an all-technical-employee unit because the Health Care Rule required just that if it were practicable to do so. Id. at 1423. In his view, the petitioned-for residual unit could be appropriate only "if it is shown that it is impracticable to place all of the technical employees in one unit." Id.

Central to Member Hurtgen's belief that an all-technical-employee unit was the only appropriate unit in *St. Mary's* was the incumbent union's desire to participate in the proceeding. Indeed, Member Hurtgen highlighted that fact in discussing the majority's decision to allow the incumbent union to be present on the ballot, and for employees to have a choice whether to join the existing technical unit. Id. According to Member Hurtgen, finding an all-technical-employee unit to be the only appropriate unit meets the "insofar as practicable" language in the Health Care Rule precisely because the incumbent union sought to intervene and participate in the proceeding, and would be included on the ballot.

III. ANALYSIS

This case is controlled by the Board's decision in *St. Mary's*. While the Employer acknowledges that fact, it proposes a decision in line with Member Hurtgen's dissent, as well as the Board's decision in *Levine Hospital of Hayward, Inc.*, 219 NLRB 327 (1975), a pre-Health Care Rule case that was overruled by *St. Mary's*. As I am bound by current law, I will not do so. The facts of this case, as stipulated by the Employer and the Petitioner, are clearly governed by *St. Mary's*. Petitioner seeks to represent all remaining unrepresented technical and professional employees, and thus seeks to represent residual non-conforming units deemed appropriate by extant Board law. The existing units here are the historical, longstanding relationships that the Board in *St. Mary's* chose not to make subordinate to congressional concern for the undue proliferation of bargaining units in the healthcare industry. As *St.Mary's* clearly controls this case, I find that the petitioned-for units are appropriate, and I will direct an election accordingly.

Notwithstanding my obligation to follow controlling precedent, the Employer's argument that Member Hurtgen's dissent should control the facts of this case is unavailing. As noted above, Member Hurtgen argued that an all-technical-employee unit in *St. Mary's* met the "insofar as practicable" language in the Health Care Rule in part because the incumbent union representing the nonconforming technical unit attempted to intervene and wanted to participate in the

proceeding. In contrast, here there is no evidence that any of the incumbent unions have an interest in representing the respective residual units. In fact, District 1199C specifically informed the regional office that it did not wish to intervene in the proceeding and would not—and indeed did not—attend the representation hearing. Inasmuch as there is no evidence that the incumbent unions are interested in representing the respective residual units, it is impracticable to require all conforming technical and professional units. Member Hurtgen's dissent, therefore, is inapplicable to the facts of this case.

I therefore direct that an election be held for the petitioned-for units.[4]

CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute voting groups or units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A (Professionals)

All full-time, part-time, and per diem Clinical Nutritionists, Clinical Nutritionist Specialists, Lead Clinical Nutritionists, Occupational Therapists, Physical Therapists, Speech Therapists, Social Workers, Senior Therapists, Dysphasia Specialists; excluding all other employees, skill maintenance employees, guards, confidential employees, and supervisors as defined by the Act.

Unit B (Non-Professionals)

[4]/ Consistent with the Board's practice and the statute, when a petition seeks to include professional employees as defined in Section 2(12) of the Act with nonprofessional employees, the professionals are entitled to the benefit of an election to determine if they wish to be included in a unit with nonprofessional employees. *Sonotone Corporation*, 90 NLRB 236 (1956).

> All full-time, part-time, and per diem Certified Occupational Therapy Assistants, Rehabilitation Aides, Physical Therapy Assistants, Recreational Therapists, and Social Work Techs; excluding all other employees, skill maintenance employees, guards, confidential employees, and supervisors as defined by the Act.

The ballot for Unit A will ask two questions:

> 1. Do you wish to be included in the same unit with nonprofessional employees of the Employer for the purpose of collective bargaining?
>
> 2. Do you desire to be represented for the purposes of collective bargaining by Crozer Professionals Union/Pennsylvania Association of Staff Nurses and Allied Professionals?

If a majority of the employees in Unit A vote yes to the first question, indicating their desire to be included in the unit with nonprofessionals, their votes will be included along with the votes of Unit B in one overall unit. If, on the other hand, the majority of Unit A votes against inclusion, they will not be included in a unit with the nonprofessionals. In that event, their votes on the second question will be counted separately to decide whether they wish to be represented by the Petitioner in a separate unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting groups found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Crozer Professionals Union/Pennsylvania Association of Staff Nurses and Allied Professionals**. In addition and because this unit includes professional and nonprofessional employees who cannot be joined in a single unit without the desires of the professional employees being determined in a separate vote, the eligible professional employees will vote whether or not they wish to be included in the same unit with nonprofessional employees of the Employer for the purposes of collective bargaining.

A. Election Details

The election details will be determined when able to be accommodated by the Regional Office after consultation with the parties.[5] The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

[5]/ At the present time, the Board has suspended the conduct of representation elections due to the extraordinary circumstances related to the COVID-19 pandemic.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the issuance of the Notice of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by a date to be determined by the regional director. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The list must also be served electronically on the other parties named in this decision.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will be issued subsequent to this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice and the ballots will be published in the following languages: English. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. Responsibility for the receipt and usability of the request for review rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: March 23, 2020

Richard P. Heller

RICHARD P. HELLER
Acting Regional Director, Region Four
National Labor Relations Board